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SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 941

THE HONORABLE J. SAM PERRY, JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION,

Petitioner,

vs.

ROSS M. MADDEN, REGIONAL DIRECTOR FOR THE THIRTEENTH REGION OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The Honorable J. Sam Perry, Judge, United States District Court for the Northern District of Illinois, Eastern Division, prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Seventh Circuit entered on February 27, 1959, granting a writ of mandamus directing and commanding the petitioner as judge of the United States District Court for the Northern District of Illinois, Eastern Division, to set aside and strike from the record supplemental findings of fact and conclusions of law which he made in the case of *Ross M. Madden,*

etc. v. *International Organization of Masters, Mates and Pilots, Inc., et al.*, Civil Case No. 58 c 1512, on October 7, 1958.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit entered on February 27, 1959 granting the writ of mandamus, is reprinted in the Appendix D, *infra*, pp. 26-36, and is reported in 264 F. 2d 169. The earlier opinion of the United States Court of Appeals for the Seventh Circuit entered on October 2, 1958, dismissing the appeal from original findings of fact, conclusions of law and order of Judge Perry is reprinted in the Appendix B, *infra*, pp. 20-23, and is reported at 259 F. 2d 297. The original findings of fact, conclusions of law and order of Judge Perry are reprinted in the Appendix A, *infra*, pp. 17-19, and are not officially reported. The supplemental findings of fact and conclusion of law of Judge Perry are reprinted in the Appendix C, *infra*, pp. 24-25, and are not officially reported.

JURISDICTION.

The judgment and order of the Court of Appeals was entered on February 27, 1959. Judge Perry's petition for rehearing was denied on April 6, 1959. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

The petition for writ of mandamus recited that jurisdiction of the Court of Appeals to grant the writ was conferred by Section 1291 of the Judicial Code (28 U. S. C. 1291) which confers appellate jurisdiction upon the respective United States Courts of Appeals with respect to the federal district courts within their circuits and by Section 1651 of the Judicial Code (28 U. S. C. 1651) which authorizes the federal courts to issue all writs necessary or appropriate in aid of their respective jurisdictions.

QUESTIONS PRESENTED.

In a suit for injunction under Section 10(l) of the National Labor Relations Act, the Regional Director for the National Labor Relations Board, after resting his case, refused to testify or produce records subpoenaed by the Union respondents in an effort to prove that he had not conducted the statutorily required investigation. The district court ruled that the Regional Director was not privileged to refuse to comply with the subpoenas because conduct of the requisite investigation is a condition precedent to filing suit and a "jurisdictional requirement." Because of his disobedience of the court's order that he comply with the subpoenas, the district court dismissed the case without stating in its order whether the dismissal was with or without prejudice. The next day the Regional Director appealed but thereafter dismissed the appeal. The day following the dismissal of the appeal, the Union respondents moved in the district court for supplemental findings of fact and conclusions of law on the ultimate substantive issues litigated during the Regional Director's presentation of his case. The questions presented are:

1. Whether in these circumstances the district court either had inherent power, or was empowered by Federal Rules of Civil Procedure 6(c), 41(b), 52(b) or 60(b), to enter such supplemental findings and conclusions.

2. Whether mandamus was a proper method by which to review the foregoing issue.

STATUTES AND RULES INVOLVED.

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*) and of the Federal Rules of Civil Procedure (28 U. S. C.) are set forth in Appendix F, *infra*, pp. 41-43.

STATEMENT.

On August 13, 1958, the Texas Company filed with the National Labor Relations Board a charge alleging that since July 20, 1958, International Organization of Masters, Mates and Pilots, its Locals 3 and 28, and their agent Harry Rutan, were engaging in unfair labor practices within the meaning of Section 8(b) (4) (A) of the National Labor Relations Act, by inducing employees of Texas to stop work for the purpose of forcing Texas to cease doing business with Ingram. On August 15, 1958, the Board's Regional Director, Ross M. Madden, filed in the United States District Court for the Northern District of Illinois, a petition for injunctive relief under Section 10(l) of the National Labor Relations Act. He alleged therein that he had investigated the charge and that, "upon the basis of such investigation and of the evidence disclosed as a result thereof," he had reasonable cause to believe and did believe that the charge was true and that a complaint should issue.

The petition further alleged that the investigation had disclosed that the International, Local 28 and Local 3 were each "labor organizations" within the meaning of the Act; that none of them had any dispute with Texas; that since July 5, 1958, they have been on strike against Ingram; and that for the illegal object of forcing or requiring Texas to cease doing business with Ingram these labor organizations induced employees of Texas to engage in strikes and work stoppages, thereby violating Section 8(b) (4) (A). The petition sought an injunction to stop the alleged labor organizations and their agent from engaging in or inducing such strikes or work stoppages.

The Union respondents filed motions to dismiss the petitions and also filed answers alleging that Local 28 is composed wholly of persons who are "supervisors" within the meaning of Section 2(11) of the Act and is therefore not

a "labor organization" within the meaning of Sections 2(5), 8(b) and 10(l) of the Act; the International had no part in the picketing complained of; prior to the filing of the petition Local 3 had abandoned its dispute with Ingram and terminated its picketing; and in any event the conduct was not prohibited by Section 8(b) (4) (A). The Union respondents further denied that the Regional Director had conducted a proper investigation and on this ground, also, moved that the petition be dismissed. To establish that they had been denied opportunity to disprove the charges in the investigation stage, the Union respondents subpoenaed the Regional Director to testify and produce his records.

The Regional Director promptly moved to quash the subpoenas. Judge Perry overruled the motions to quash. The Regional Director thereafter proceeded to put on his entire affirmative case which consumed five days of litigation. After the Regional Director had rested, the Union respondents called the Regional Director as their first witness. He refused to testify. The Union respondents then made an oral motion that the petition for injunctive relief be dismissed for failure of the Regional Director to comply with the subpoenas. Judge Perry granted this motion, stating orally that he would enter a final order dismissing the petition "for the reason that the Petitioner, Ross Madden, has refused to abide by and present the various documents called for in the subpoena *duces tecum*, has refused to comply with it, and has also refused to testify concerning whether or not he made a proper investigation." Judge Perry's findings of fact, entered August 26, 1958, recites the above events culminating in the Union's oral motion to dismiss. His conclusions of law state that a preliminary investigation "is a condition precedent to the right of the Regional Director to file a petition and is a jurisdictional requirement compliance with which" respondents may challenge in injunction proceedings; that

the Regional Director's refusal to testify deprives the unions "of the opportunity to establish a relevant defense, by due process of law"; that no evidence has been produced connecting the International with the events complained of; and "For the foregoing reasons, an order should be entered dismissing the petition for injunctive relief as to all respondents" (pp. 17-19, *infra*). His order states that "the petition be and it hereby is dismissed."

On August 27, 1958, the day following the entry of Judge Perry's order, the Board appealed therefrom to the United States Court of Appeals for the Seventh Circuit. On September 28, 1958, it filed a motion to dismiss the appeal, stating that it had recently discovered that its own rules had not been followed in certain respects; that this was legally immaterial, but that "the interests of a fair and proper administration of the Act will best be served by a dismissal of the appeal herein." The Board further stated: "Such dismissal, in the opinion of the Government, would not necessarily preclude the institution of a fresh Section 10(l) proceeding if new charges are filed alleging that the Unions have resumed picketing which is proscribed by Section 8(b) (4) of the Act." While consenting to the granting of the Board's motion, counsel for the Unions wrote on the face thereof that the Unions "do not consent or agree to" the latter statement of opinion.

On October 2, 1958, the Seventh Circuit entered its opinion and order dismissing the Board's appeal (pp. 20-23, *infra*). The opinion announced sharp disagreement with the Board's view that defects in investigation were not litigable; it predicated dismissal of the appeal on the Board's belatedly confessed error; however, it did not affirm, vacate or modify Judge Perry's order dismissing the petition (p. 23, *infra*).

On October 3, 1958, the next day after the Seventh Circuit dismissed the appeal, the Unions moved the district

court for supplemental findings of fact and conclusions to the effect that Local 28 is not a labor organization because it is composed exclusively of supervisors; that the picketing by Locals 28 and 3 is primary rather than secondary and is not prohibited by Section 8(b) (4) (A); and that it would not be just or proper to grant the injunctive relief requested (p. 29, *infra*). The district court, holding, after argument, that under the circumstances the Unions were entitled to this additional relief, entered the supplemental findings and conclusions (pp. 24-25, 29-30, *infra*).

On November 27, 1958, the Board filed in the Seventh Circuit a petition for a writ of mandamus to compel Judge Perry to vacate his supplemental findings and conclusions. On February 27, 1959, the Seventh Circuit handed down its opinion and order directing that a writ of mandamus issue commanding Judge Perry forthwith to set aside and strike from the record the supplemental findings and conclusions (pp. 26-36, *infra*). The Seventh Circuit ruled that Judge Perry's order of August 26, 1958, was not on the merits, that his dismissal left no case pending in his court and "hence his entries of findings and conclusions thereafter were not germane to any action in his court" (p. 32, *infra*). The Seventh Circuit considered Rules 41(b), 52(b) and 60(b) of the Federal Rules of Civil Procedure, but held that they were not inconsistent with its holding (pp. 31-36, *infra*).

With respect to Rule 41(b), the Seventh Circuit construed the provision therein that "unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision or any dismissal not provided for in this rule * * * operates as an adjudication upon the merits" as inapplicable where the order shows on its face that it was based on grounds which did not involve consideration of the

ultimate substantive issues in the litigation (pp. 33-35, *infra*). The court further read the exception to the above language expressed in the words "other than a dismissal for lack of jurisdiction" as applicable here because "according to the court's order, the dismissal was based upon a failure of a jurisdictional requirement, which is expressly excepted from the operation of rule 41(b)" (pp. 33-34, *infra*).

Because the order was deemed not to operate as an adjudication on the merits, rule 52(b) was deemed irrelevant (p. 35, *infra*).

Rule 60(b) was held inapplicable because its purpose—to enable courts "to relieve" a party of a judgment or order—does not extend to a case where, in the court's view, the petitioner had not "sought *relief* from the order of dismissal and no reason is suggested as to why they want *relief* from an order which they caused the district court to enter" (italics the court's, see pp. 35-36, *infra*).

The Seventh Circuit held that mandamus was an appropriate remedy because no appeal could have been taken from the entry of the supplemental findings and conclusions of law. The court held that "potential mischief" inhered in the supplemental findings and conclusions because they could be used as a "pretext" to bolster an argument that the record before Judge Perry "is *res judicata* or collateral estoppel in proceedings against the same union on new causes of action" (p. 36, *infra*).

In this connection the Seventh Circuit adverted to the fact that the supplemental findings of fact and conclusions of law had already been cited to the United States District Court for the Eastern District of Missouri, Eastern Division, in *Cosentino* v. *Local 28*, a case filed there on December 11, 1958, by the Board to enjoin the same course of picketing activity which the Board had sought to enjoin in the suit before Judge Perry (pp. 31-32, *infra*). It noted that on

January 8, 1959, Judge Harper of the Eastern District of Missouri, had dismissed the petition in that case as *res judicata*, holding that under Rule 41(b) of the Federal Rules of Civil Procedure, Judge Perry's dismissal order operated as an adjudication on the merits (pp. 32, 37-40, *infra*).

The Board has appealed Judge Harper's decision to the United States Court of Appeals for the Eighth Circuit, *Cosentino* v. *Local 28*, No. 16161, where the case is now pending undecided, oral argument having been heard on May 6, 1959. In its reply brief to the Eighth Circuit, the Board argued that that court is bound by the Seventh Circuit's opinion that Judge Perry's order does not operate as an adjudication on the merits.

REASONS FOR GRANTING THE WRIT.

1. The case presents issues of far reaching importance in the administration of justice. The principal question is whether, as the court below held, the post-decree powers of a district court terminate when it enters an order of dismissal without reaching the ultimate substantive issues in the litigation. At common law, post-decree power expired, at the earliest, at the end of the term of court at which the order or decree was entered. Even that limitation was abolished by Rule 6(c) of the Federal Rules. The power of federal courts to alter or amend their judgments or correct errors or remedy deficiencies in their findings of fact and conclusions of law in the interest of justice applies no less to dismissals than to other final orders. Nothing in precedent or in reason suggests that this power exists and may be exercised only if the dismissal order was based upon the ultimate substantive issues. By its very nature, the power to amend and correct must apply to all cases, even those in which dismissal may have been predicated on "failure of a jurisdictional requirement".

The central holding below that dismissal of the petition

"left no case pending" upon which Judge Perry could exercise any post-decree power is squarely in conflict with the decision of the Eighth Circuit in *Boaz* v. *Mutual Life Ins. Co. of New York*, 8 Cir., 1944, 146 F. 2d 321. There the district court entered an order of dismissal without prejudice. Two days later a motion was filed seeking to set aside the dismissal without prejudice and enter an order of dismissal with prejudice. The court granted the motion, made extensive findings of fact, based, as here, upon the evidence presented by the plaintiff before she rested her case, and entered an order of dismissal with prejudice. *Boaz* v. *Mutual Life Ins. Co. of N. Y.*, E. D. Mo., 1943, 53 F. Supp. 97. On appeal the jurisdiction of the court to enter such an order was attacked. The Eighth Circuit held that the district court had inherent power so to change its judgment (146 F. 2d at 322).

While in the *Boaz* case there had not been any intervening appeal and dismissal thereof, it is uniformly agreed that an abortive appeal which is dismissed without any judgment of reversal or affirmance leaves the trial court with the same jurisdiction over the proceedings as if no appeal had taken place. "The trial court is not dependent on the action of the appellate court for its jurisdiction, nor is it required to proceed in any particular way by virtue of the appeal having been dismissed." *Wilson* v. *Aderhold*, 5 Cir., 1937, 89 F. 2d 903, 904. "Since there is no problem of deviating from the appellate court's mandate, and since the appeal no longer pends, the district court has the power to entertain a timely motion for relief under 60(b)." 7 Moore's Federal Practice, 2d Ed. p. 338; 3 Am. Jur., p. 327, Appeal and Error, § 758 and 1958 Supp., p. 57; *Hirsch* v. *United States*, 6 Cir., 1951, 186 F. 2d 524, 525; *Stewart* v. *Oneal*, 6 Cir., 1917, 237 Fed. 897, 918, cert. denied, 243 U. S. 645; *Newman* v. *Moyers*, 1920, 253 U. S. 182, 186.

The court below agreed that its dismissal of the appeal did not curtail the district court's post-decree powers. Thus, insofar as interpretation and application of Rule 6(c), Rule 41(b) and Rule 60(b) is concerned, the question posed is in the same posture as if no appeal had ever been taken from Judge Perry's order. *Cf. District of Columbia* v. *Stackhouse*, D. C. Cir., 1956, 239 F. 2d 62, 65.

That an appeal was taken only one day after entry of the order and then abandoned, does, however, affect the application of Rule 52(b). That rule affords 10 days after entry of judgment for a party to move in the district court for amended or "additional" findings. Since taking of an appeal removes the case from the district court's hands, ingenious lawyers, sensing a deficiency in the judgment, could curtail the time allowed to amend by taking an immediate appeal and then moving for its dismissal before the victorious party realizes that there are desirable additions to be made. To effectuate the policy of Rule 52(b) this Court should hold that where, during the 10 day period, an appeal is taken and subsequently dismissed, the period is tolled while the case is pending on appeal.

Irrespective of whether the 10 day period is tolled by the appeal, Rule 60(b) authorizes relief within a reasonable time even to the prevailing party if he had not been "awarded all the relief to which he is entitled." 7 Moore's Federal Practice, 2nd Ed., p. 230, Par. 60.22[1]. Since the ultimate substantive issues had been fully litigated, the Unions were entitled under Rules 54(c) and 41(b) to findings of fact and conclusions of law upon them. *Makowsky* v. *Porlik*, 3 Cir. 1959, 262 F. 2d 13, 14; *Civil Aeronautics Board* v. *Friedkin Aeronautics*, 9 Cir., 1957, 246 F. 2d 173, 176.

The power of a district court to amend or supplement its findings is not merely an adjunct of appeal (*United States* v. *Forness*, 2 Cir., 1942, 125 F. 2d 928, 942, note 42,

and accompanying text, certiorari denied, 316 U. S. 694; notes of the Advisory Committee on amendment to the Federal Rules, 28 U. S. C. A., Rule 52, p. 15). The question here presented is therefore not affected by whether the supplemental findings and conclusions constitute a final order from which the Board could have appealed. *Johnson* v. *Wharton*, 1894, 152 U. S. 252, 256-257; *United States* v. *Munsingwear*, 1950, 340 U. S. 36, 40-41. Indeed, the question is the same as it would have been if, after dismissal of the appeal, Judge Perry had vacated his initial order and entered a new order predicating dismissal both on the failure to investigate and on the ultimate substantive issues. In passing upon the motion for supplemental findings Judge Perry specifically stated that he was empowered to do this. To clarify the effect and operation of the Federal Rules, and the authority and responsibility of district courts, this Court should grant certiorari.

2. This case also presents a situation of actual and potential conflict between decisions in the courts of the Seventh and Eighth Circuits which requires resolution by this Court. Judge Harper in the United States District Court for the Eastern District of Missouri held that the order of dismissal entered by Judge Perry constitutes an adjudication on the merits and is *res judicata* of a second injunction proceeding between the same parties. The court below, after having dismissed an appeal from Judge Perry's original order, has now issued mandamus to strike supplemental findings and conclusions in support of that order, on the theory that the order was not an adjudication on the merits, but rather a dismissal without prejudice.

So far as relevant here, Rule 41(b) provides:

> "(b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff * * * to comply with * * * any order of court, a defendant may move for dismissal of an action * * * against him. * * * Unless the court in its order for dismissal otherwise specifies, a dismissal

under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits."

In *United States* v. *Procter & Gamble Co.*, 1958, 356 U. S. 677, the Government, claiming privilege, refused to obey a district court order that it produce certain documents. The Government itself proposed that the court enter an order dismissing its case. The defendant argued that because dismissal had been proposed by the plaintiff rather than by the defendant the dismissal did not operate under Rule 41(b) as adjudication on the merits. This Court held that by refusing to obey the district court's order the Government, *ipso facto*, had forfeited the case on the merits. "When the Government proposed dismissal for failure to obey, it had lost on the merits." 356 U. S., at 680-681.

The holding that the Board did not lose on the merits by defying Judge Perry's order is in square conflict with *Procter & Gamble*. Interpretation of the phrase "otherwise specifies" as comprehending every specified reason for dismissal other than the ultimate substantive issues mutilates the language of Rule 41(b), vitiates its purpose, and conflicts with the construction adopted by every other circuit which has considered the matter.[1] As used in Rule 41(b) the phrase "on the merits" means "with prejudice". *Producers Releasing Corp. de Cuba* v. *PRC Pictures*, 2 Cir., 1949, 176 F. 2d 93, 96. The very purpose of the Rule was to avoid "any need for speculation as to the intent of the court where the order fails to indicate whether or not it is with prejudice". 5 Moore's Federal Practice, 2nd Ed.,

1. *Societe Internationale, etc.* v. *Brownell*, D. C. Cir., 1955, 225 F. 2d 532, 539-540, reversed on other grounds 357 U. S. 197; *Fischer* v. *Dover S. S. Co.*, 2 Cir. 1955, 218 F. 2d 682, 683; *First Iowa Hydro Elec. Coop.* v. *Iowa-Illinois Gas & E. Co.*, 8 Cir. 1957, 245 F. 2d 613, 628-629; *Refior* v. *Lansing Drop Forge Co.*, 6 Cir. 1942, 124 F. 2d 440, 443-444; *Hubbard* v. *B. & O. R. R. Co.*, 6 Cir. 1957, 249 F. 2d 886, 887; *Mooney* v. *Central Motor Lines*, 6 Cir. 1955, 222 F. 2d 572, 573.

Section 41.14, pp. 1047-1048. To prevent "harassment of defendants" (*Perlman* v. *332 West Seventy-Second Street Co.*, 2 Cir., 1942, 127 F. 2d 716, 718) the Rule deliberately reversed the common law rule that "a dismissal without consideration of the merits is also without prejudice to the complainant". *Peardon* v. *Chapman*, 3 Cir., 1948, 169 F. 2d 909, 913.

In holding that the dismissal was ordered "for lack of jurisdiction" within the meaning of Rule 41(b), and for that reason also did not operate as an adjudication on the merits, the court below misconceived the concept of "jurisdiction" as used in Rule 41(b) and, in addition, plainly misinterpreted Judge Perry's conclusions of law. In Rule 41(b) "lack of jurisdiction" means lack of power over the person or over the subject matter of the action. Even a proven total failure of the Regional Director to investigate would not deprive the district court of jurisdiction in this sense. On its own reading of Judge Perry's conclusions the court below held that Judge Perry had dismissed because the Regional Director "*had no right to maintain the action*". But it is settled that "Whether a plaintiff seeking relief has the requisite standing is a question going to the merits, and its determination is an exercise of jurisdiction. * * * If it be resolved against him, the appropriate decree is a dismissal for want of merits, not for want of jurisdiction". *General Investment Co.* v. *N. Y. Central R. R.*, 1926, 271 U. S. 228, 230-231. *Cf. Civil Aeronautics Board* v. *Friedkin Aeronautics*, 9 Cir., 1957, 246 F. 2d 173, 175, n. 6, 176; *Moran* v. *Moran*, D. C. Cir., 1947, 160 F. 2d 925, 926-927.

Read in the context of his findings of fact, and the issues posed by the Board's claim of privilege, Judge Perry's first two conclusions of law, in which he referred to investigation as a "jurisdictional requirement", were plainly designed to indicate the grounds upon which he rejected

the assertion of governmental immunity (*cf. Procter & Gamble, supra*), rather than to establish a factual basis for his order of dismissal. Judge Perry did not assume that the evidence withheld by the Regional Director would be adverse to the Board. Rather, as he stated in his third conclusion of law, he held that the defendant was entitled to attempt to prove that the required investigation had not been conducted; that the plaintiff was not entitled to withhold evidence in his possession sought in connection with such an attempt; if the plaintiff did so, he prevented the defendant from establishing a defense, thereby depriving him of due process of law.

Judge Perry at no time ruled that he did not have jurisdiction of the suit. His use of the term "relevant defense" to characterize the significance of a failure by the Regional Director to investigate itself establishes this. The finding that "no evidence had been produced connecting" the International Union "with the events complained of in the petition" shows his belief that he had jurisdiction of the case and could properly rule on the merits (p. 19, *infra*). His subsequent entry of the supplemental findings of fact and conclusions of law further shows that Judge Perry did not regard the impropriety of the investigation, a fact belatedly disclosed only after the case had left his hands, as affecting his "jurisdiction".

Even assuming, *arguendo*, that the Regional Director's failure to accord the Unions their rights during the investigation was relevant to the court's jurisdiction, the holding that Judge Perry's dismissal order does not operate to bar a second attempt by the Board to reach the ultimate substantive issues is clearly erroneous. On that assumption the holding is in square conflict with *Angel* v. *Bullington*, 1947, 330 U. S. 183, 190; *Retail Clerks Local No. 1564* v. *Your Food Stores*, 10 Cir., 1955, 225 F. 2d 659, 662-663, and cases therein cited. The Board had its chance

to testify before Judge Perry. Having refused and then let his order stand, on *res judicata* principles the Board must be barred from attempts at relitigation. *Angel* v. *Bullington, supra; United States* v. *Munsingwear*, 1950, 340 U. S. 36.

3. In compelling Judge Perry to vacate his supplemental findings and conclusions for the purpose of clearing the Board's path to relitigation of the issues with which they deal, the Seventh Circuit exercised power which the Eighth Circuit in *Larsen* v. *Nordbye*, 1950, 181 F. 2d 765, 766, held that a Court of Appeals in a mandamus action does not possess. There the court held that mandamus cannot properly issue to compel a district judge to grant a motion to dismiss without prejudice. Whether a dismissal shall be with prejudice or without prejudice is a matter of discretion committed to the district judge for decision. It is for the district judge to decide whether victorious defendants should be protected against a plaintiff's threat to compel them to relitigate issues which the plaintiff litigated fully in the case before him. *Dietsche* v. *Huidekoper*, 1880, 103 U. S. 494, 498. His judgment on such a matter may be reviewed only on an appeal. Mandamus may not be substituted for appeal, whether an appeal is available or not. *Interstate Commerce Commission* v. *United States*, 1933, 289 U. S. 385, 393, 394. Unless there is a total lack of power or an abuse of discretion, mandamus will not lie. *Parr* v. *United States*, 1956, 351 U. S. 513, 520; *Bankers Life & Cas. Co.* v. *Holland*, 1953, 346 U. S. 379, 382-383.

For these reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

MOZART G. RATNER,
Attorney for Petitioner.

APPENDIX A.

UNITED STATES DISTRICT COURT

For the Northern District of Illinois,
Eastern Division.

ROSS M. MADDEN, etc., *Petitioner,* *vs.* INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, INC., *et al.,* *Respondents.*	Civil No. 58 C 1512.

FINDINGS OF FACT.

[Filed August 26, 1958.]

This case came on to be heard on petition of Ross M. Madden, Regional Director of the National Labor Relations Board, for an injunction under Section 10(l) of the National Labor Relations Act, and the court having heard petitioner's evidence in support of the allegations of its petition and petitioner having rested, respondents called petitioner as their first witness to testify concerning respondents' allegations in their several answers and motion to dismiss that petitioner had not, prior to filing the petition herein, conducted a preliminary investigation of the amended charge upon which the petition is based, as required by Section 10(l) of the Act and Section 101.4 of the NLRB's Statements of Procedures, Series 7, as amended, and the court having overruled petitioner's motion to quash the subpoena and the subpoena duces tecum requiring petitioner to testify concerning the preliminary investigation alleged in the petition to have been conducted

by him and under his supervision and to bring with him his files, memoranda, and other papers bearing upon such investigation and petitioner, on advice of counsel, declining to produce said files and documents and declining to testify concerning the conduct of a preliminary investigation by him and under his supervision and, because of instructions of his superiors, declining to answer the questions of respondents' counsel concerning same; and counsel for respondents having moved that the petition for injunctive relief be dismissed for failure of the Regional Director to comply with said subpoenas and having further moved that the petition be dismissed as against respondent MMP for want of evidence that respondent MMP participated in any of the matters alleged in the petition, and the Court having heard arguments of counsel and being fully advised in the premises, makes the following:

Conclusions of Law

1. Conduct by petitioner of a preliminary investigation of the amended charge as required by Section 10(l) of the Act and Section 101.4 of the NLRB's Statements of Procedure prior to filing a petition for injunction based thereon is a condition precedent to petitioner's right to file a petition and is a jurisdictional requirement compliance with which respondents are entitled to challenge and litigate in this proceeding. *NLRB* v. *Highland Park Mfg. Co.*, 341 U. S. 322, 325; *Goodman Mfg. Co. v. NLRB*, 234 F. 2d 775, 776 (CA 7); *Crowell* v. *Benson*, 285 U. S. 22, 54-55.

2. Petitioner is not by law entitled to withhold evidence as to its compliance with said jurisdictional requirement in this proceeding in which petitioner is invoking the court's aid and seeking judicial relief. *U. S. v. Ragen*, 180 F. 2d 321 (C. A. 7).

3. Petitioner's refusal to testify and produce the evi-

dence required by the subpoena deprives respondents of opportunity to establish a relevant defense, by due process of law,

4. No evidence has been produced connecting respondent MMP with the events complained of in the petition.

5. For the foregoing reasons, an order should be entered dismissing the petition for injunctive relief as to all respondents.

ORDER.

It is hereby ordered, adjudged and decreed that the petition be and it hereby is dismissed. And it is further ordered that the temporary restraining order heretofore entered and extended be and it hereby is dissolved. The restraining order heretofore entered is hereby continued in full force and effect until 6 P. M. August 29, 1958, solely for the purpose of appealing this cause to the Court of Appeals of the 7th Circuit.

/s/ JOSEPH SAMUEL PERRY,
Judge U. S. District Court.

August 26, 1958.

APPENDIX B.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

No. 12428. September Term and Session, 1958.

ROSS M. MADDEN, Regional Director of the Thirteenth Region of the NATIONAL LABOR RELATIONS BOARD, for and on behalf of the National Labor Relations Board,
Plaintiff-Appellant,
vs.
INTERNATIONAL ORGANIZATION OF MASTERS AND PILOTS, INC., AFL-CIO, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

October 2, 1958.

Before FINNEGAN, HASTINGS and PARKINSON, *Circuit Judges.*

FINNEGAN, *Circuit Judge.* On August 28, 1958, Ross M. Madden, Regional Director of the Thirteenth Region of the National Labor Relations Board, pressed an "emergency" motion in our court, asking in substance, for a temporary order restraining Local 28, International Organization of Masters, Mates and Pilots, Inc., AFL-CIO; Associated Maritime Workers Local 3, International Organization of Masters, Mates and Pilots, Inc., AFL-CIO; their officers, representatives, et al., from engaging in

picketing at or in the vicinity of the Texas Company. Earlier in August, this Director filed a petition in the District Court for such relief and a temporary restraining order was entered by Judge Knoch, then sitting in the District Court.

A short time after that order was entered, respondents sought a subpoena for the Director's appearance, coupled with a subpoena *duces tecum*, requiring him to testify concerning the preliminary investigation alleged in the petition to have been conducted by him and under his supervision. He declined to produce his files and refused to testify concerning conduct of the preliminary investigation required by § 10(l) of the National Labor Relations Act, 61 Stat. 136, 29 U. S. C. § 141. Judge Perry, before whom this second phase of the case was developed then dismissed, on August 26, 1958, the petition for injunctive relief, finding *inter alia:*

> "1. Conduct by petitioner of a preliminary investigation of the amended charge as required by Section 10(l) of the Act and Section 101.4 of the NLRB's Statements of Procedure prior to filing a petition for injunction based thereon is a condition precedent to petitioner's right to file a petition and is a jurisdictional requirement compliance with which respondents are entitled to challenge and litigate in this proceeding. • • •
>
> "2. Petitioner is not by law entitled to withhold evidence as to its compliance with said jurisdictional requirement in this proceeding in which petitioner is invoking the court's aid and seeking judicial relief.
>
> "3. Petitioner's refusal to testify and produce the evidence required by the subpoena deprives respondents of opportunity to establish a relevant defense, by due process of law. • • •".

On appeal from that order of August 26, 1958 a division of Judges, after hearing oral arguments entered an order, dated September 10, 1958 restraining the respondent

Unions until further order of this Court. About two weeks later an Associate General Counsel for the National Labor Relations Board filed a motion to dismiss the Director's appeal, and vacate our injunction. We notice that this Counsel's name appears on the initial petition filed August 15, 1958 in the District Court. In any event, the attorney of record for respondents consented in writing to this dismissal.

Now, Associate General Counsel for the Board, informs us by way of his motion to dismiss:

> "Following the appeal in this case, however, and after entry of this Court's injunctive order of September 10, 1958, it has come to the attention of the General Counsel of the National Labor Relations Board, whose responsibility it is to conduct the litigation in proceedings of this kind, that the procedures prescribed for investigations of charges in Section 10(l) cases, as provided in the Board's published Statements of Procedure, were not in fact followed in this case in two respects. Thus, it was discovered that appellee Local 28 had not been requested 'to submit a written statement of its position,' before the petition was filed, nor had representatives of Local 28 been interviewed, both of which steps are provided for by Section 101.4 of the Board's Statements of Procedure.
>
> "In view of the foregoing facts which have now come to light, it is believed that the interests of a fair and proper administration of the Act will best be served by a dismissal of the appeal herein. Such a dismissal, in the opinion of the Government, would not necessarily preclude the institution of a fresh Section 10(l) proceeding if new charges are filed alleging that the Unions have resumed picketing which is proscribed by Section 8(b)(4) of the Act."

It seems strange indeed that the Board and its Counsel only lately discovered the vital derelictions, of steps prescribed by the Board itself in its Statements of Procedure,

confessed as error at this late date. We think it a striking coincidence that the Director vigorously resisted production of his files and records under the circumstances now brought to our attention. Plainly speaking the Director was not entitled at any time to equitable relief under the Act.

We think it well for the bench and bar to know that when the Board seeks relief under § 10(l) of the Act, it concedes it must comply with its own Statements of Procedure and an inquiry into such a showing may not be amiss.

The appeal is dismissed because this Court finds the Board failed to comply with its own procedures and not because counsel decided to take the case out of our hands.

Our restraining, and enjoining, order heretofore entered on September 10, 1958, is hereby vacated, and the appeal dismissed with prejudice.

APPENDIX C.

UNITED STATES DISTRICT COURT

For the Northern District of Illinois,
Eastern Division.

ROSS M. MADDEN, ETC., *Petitioner,* *vs.* INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, INC., ET AL., *Respondents.*	Civil No. 58-C-1512.

SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW.

[Filed October 7, 1958.]

On motion of respondents, the Court makes the following supplemental findings of fact and conclusions of law:

1. Respondent Local 28 is an organization composed exclusively of persons employed in the capacity of deck officer, i.e., master, mate or pilot, aboard vessels navigating rivers in the middle western United States. Such persons are supervisors within the meaning of Section 2(11) of the National Labor Relations Act.

2. On August 12, 1958, Local 28 began to picket Ingram Company barges when said barges were present on the premises of Texas Company for the purpose of compelling Ingram to offer reinstatement to members of Local 28.

3. In said picketing, Local 28 acted exclusively on its own behalf and on behalf of its members, and not on behalf of or in a joint venture with respondent Local 3, respondent International or any other organization or person.

4. On August 7, 1957, respondent Local 3 terminated its strike against Ingram and has not thereafter engaged in any picketing of Ingram. There is no reasonable cause to believe that Local 3 will engage in picketing of Ingram in the foreseeable future.

Upon the foregoing findings, the Court makes the following conclusions of law:

1. Respondent Local 28 is not, and there is no reasonable cause to believe that it is, a "labor organization" within the meaning of the National Labor Relations Act. Local 28, in picketing, did not act, and there is no reasonable cause to believe that it did act, as "agent" of any "labor organization" within the meaning of the National Labor Relations Act. *DiGiorgio Fruit Corp.* v. *N. L. R. B.*, 191 F. 2d 642, 645-647 (C. A. D. C.); *A. H. Bull Steamship Co.* v. *M. E. B. A.* and *M. M. P.*, 250 F. 2d 332, 333 (C. A. 2), cert. denied, 355 U. S. 932.

2. The picketing by respondents Locals 28 and 3 complained of by petitioner is primary rather than secondary and is not prohibited by Section 8(b)(4)(A).

3. It would not be just and proper to grant the injunctive relief requested by petitioner.

Entered:

/s/ Joseph Sam Perry,
U. S. District Judge.

APPENDIX D.

IN THE
UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

No. 12506 SEPTEMBER TERM, 1958 JANUARY SESSION, 1959.

Ross M. MADDEN, Regional Director for the Thirteenth Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

The Honorable J. SAM PERRY, Judge, United States District Court for the Northern District of Illinois, Eastern Division,
Respondent.

Petition for Writ of Mandamus.

FEBRUARY 27, 1959.

Before SCHNACKENBERG, HASTINGS and PARKINSON, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* Ross M. Madden, Regional Director for the Thirteenth Region of the National Labor Relations Board, by his petition filed November 26, 1958, asks us to issue a writ of mandamus directing Judge J. Sam Perry[1] of the United States District Court

* 13-CC-182.

1. The respondent judge will be herein referred to as "Judge Perry."

for the Northern District of Illinois, Eastern Division, to vacate supplemental findings of fact and conclusions of law entered on October 7, 1958, in case 58 C 1512 of that court. Judge Perry has filed an answer.

All of the relevant facts, which we now state, are undisputed.

On August 15, 1958, the Regional Director filed a petition in the district court alleging that International Organization of Masters, Mates and Pilots, Inc., AFL-CIO, Local 28 and Local 3 of the above International (some times referred to as the Locals), and Harry Rutan, their agent, were engaging in activities in violation of section 8 (b) (4) (A) of the National Labor Relations Act[2] (herein called the Act), and praying that an injunction be issued under section 10 (1) of the Act,[3] enjoining said respondents from continuing such activities pending final disposition by the Board of the unfair labor practice charges filed with it.

Respondents controverted the material allegations of the petition, alleging *inter alia* that Local 28 is not a "labor organization" within the meaning of the Act; the International had no part in the picketing complained of; at no material time did any of the respondent unions act "in concert" or as "agents for each other" in respect to the matters involved; prior to the filing of the petition Local 3 had abandoned its dispute and terminated its picketing; and the inducement complained of was not, as alleged, violative of section 8 (b) (4) (A). Respondents also denied that the Regional Director had, as he alleged, conducted an "investigation," and on this ground they moved that the petition be dismissed.

The Regional Director, when under subpoena and called adversely by respondents, at the direction of his superiors

2. 29 U. S. C. A. § 158 (b) (4) (A).
3. *Ibid.* § 160 (1).

refused to produce his files or testify concerning his alleged investigation of the defenses raised by respondents, although ordered by the court to do so.

On August 26, 1958, on motion of respondents, Judge Perry dismissed the petition for injunction on the ground that the Regional Director's refusal to testify as to whether he had conducted the preliminary investigation required by section 10 (1), of the Act, and to produce evidence required by subpoena, deprived "respondents of opportunity to establish a relevant defense, by due process of law".

Judge Perry did not then rule upon a motion of Local 28 to dismiss the petition, on the ground that it had not been established that it was a labor organization within the meaning of the Act, and no determination was made as to any of the other merits of the petition, except as to International.[4]

On August 27, 1958, the Regional Director appealed to this court from the dismissal of the petition as to the Locals and Rutan. But, before the case was heard here, the Regional Director requested that the appeal be dismissed.[5] This court on October 2, 1958, granted the

4. The court also dismissed the case as to International on the further ground that it was not shown to have been involved in any of the events in issue. This ground of dismissal is not involved in the proceeding now before this court.

5. The reasons for this request, as then stated were:

"Following the appeal in this case * * * it has come to the attention of the General Counsel of the National Labor Relations Board, whose responsibility it is to conduct the litigation in proceedings of this kind, that the procedures prescribed for investigation of charges in Section 10 (1) cases, as provided in the Board's published Statements of Procedure, were not in fact followed in this case in two respects. Thus it was discovered that appellee Local 28 had not been requested 'to submit a written statement of [its] position,' before the petition was filed, nor had representatives of Local 28 been interviewed, both of which steps are provided for by Section 101.4 of the Board's Statements of Procedure.

"In view of the foregoing facts which have now come to light,

motion "because [the] court finds the Board failed to comply with its own procedures," and dismissed the appeal "with prejudice". Case No. 12428, *Madden* v. *International Organization, etc.*, 259 F. 2d 297, 300.

On October 3, 1958, the Locals filed with Judge Perry an "Emergency Motion for Supplemental Findings of Fact and Conclusions of Law." These findings and conclusions pertained to and purported to decide the merits of the petition upon which issues had been raised by the respondents' motions and answers. The Locals' motion argued:

> "To make it perfectly clear that petitioner may not relitigate the controversy which petitioner has already litigated in this case, it is equitable and proper that this Court enter additional findings of fact and conclusions of law in support of its order of dismissal. These findings and conclusions are specified in the defenses stated by respondents in their motions to dismiss and answers filed herein at the opening of the hearing and were fully established in the course of proof of petitioner's case."

The Regional Director opposed that motion on the ground that the district court was without authority to enlarge the scope of its findings and conclusions after dismissal of the proceeding on a procedural ground,[6] when no

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it is believed that the interests of a fair and proper administration of the Act will best be served by a dismissal of the appeal herein. Such a dismissal, in the opinion of the Government, would not necessarily preclude the institution of a fresh Section 10, (1) proceeding if new charges are filed alleging that the Unions have resumed picketing which is proscribed by Section 8 (b) (4) of the Act."

6. "Mr. Beeson (Counsel for the Regional Director): We regard, your Honor, the decision of the Seventh Circuit Court of Appeals as having laid this case to rest permanently. There is a procedural defect in it, and that means that that point can no longer be litigated and it remains then for a new cause of action to develop and a fresh proceeding which will be free of this procedural defect.

"The Court: A complete new cause of action. * * * That's the

further appeal could be taken to review the validity of such proposed findings.

However, on October 7, 1958, Judge Perry granted the Locals' motion and entered said supplemental findings and conclusions, which, in effect, purport to determine (1) that respondent Local 28 is not a labor organization within the meaning of the Act; (2) that the picketing by Local 28 was carried on in support of its own dispute with the primary employer, and not on behalf of Local 3 (which concededly is a "labor organization"), (3) that there is no reasonable cause to believe that respondent Local 3 will resume picketing, and (4) that all of the picketing in this case was in any event primary activity which is not proscribed by the Act.

On November 4, 1958, a new unfair labor practice charge was filed with the Regional Director, alleging *inter alia* that Locals 3 and 28 had resumed picketing activities following the dismissal order of August 26, 1958, and that such activities, like these alleged in the first case, were violative of section 8 (b) (4) (A) of the Act.

The Regional Director represents to this court that unless we direct Judge Perry to vacate the supplemental findings aforesaid, such findings will be advanced as a bar to instituting a section 10 (1) proceeding in any future case in which charges may be filed with the Regional Director alleging that Locals 28 and 3 have resumed unlawful picketing activities. He argues:

> "Indeed, the declared purpose of these unions in requesting such findings was to preclude future Section 10 (1) proceedings. Although petitioner believes that the supplemental findings should not have their intended effect, in view of the District Court's lack of

way I look at it. I think they mean to dispose of this case for all purposes. That is the way it looks to me. It seems to me that is what they meant to do. It seems to me that there should be no question of res judicata. * * *"

> authority to enter them, it cannot be certain that the courts in future 10 (1) proceedings will not nevertheless regard them as conclusive. This danger is augmented by the reluctance of the law to permit collateral attacks on earlier proceedings, even though error therein be shown. * * * More specifically, there is an immediate danger that the supplemental findings and conclusions will be invoked to bar the Regional Director from maintaining a Section 10 (1) proceeding with respect to the new charges filed with him, as described in paragraph 10, above, alleging that Locals 28 and 3 have resumed unlawful picketing activity."

The answer of Judge Perry to the petition for writ of mandamus now before us, sets forth, *inter alia*, that on December 11, 1958, the Board filed in the United States District Court for the Eastern District of Missouri, Eastern Division, a petition under section 10 (1) for injunctive relief against Local 28 and its agents, and that it thereby sought the same relief as the Regional Director's petition before Judge Perry, that said petition was based on three charges against respondents herein, involving alleged illegal picketing by respondents on November 4 and 18, 1958, the charges having been filed originally in the Chicago office of the Board, and thereafter transferred to the St. Louis office.

The answer further sets forth these facts: On December 17, 1958, in response to an order to show cause issued in that action, respondents therein filed a motion to dismiss the petition, to which was attached a copy of the petition, the initial order of the district court, the opinion of this Court in No. 12428, and the supplemental findings of fact and conclusions of law in case No. 58-C-1512. During oral argument on the motion on December 18, 1958, Judge Harper stated, *inter alia*, that in his view, the cases were based upon the same cause of action and that, on *res judicata* principles, the second petition was barred by the original order of the district court dismissing the first pe-

tition. He stated that he thought it unnecessary to consider the supplemental findings and conclusions in case 58-C-1512, for they would come into play only if pleaded as collateral estoppel on a different cause of action. On January 8, 1959 Judge Harper dismissed the petition on the ground that Judge Perry's dismissal of the petition in his court was based on the failure to comply with the *subpoena duces tecum* issued in that action and that, under rule 41 (b) of the Federal Rules of Civil Procedure,[7] "dismissal of an action for failure to comply with an order of the court operates as an adjudication upon the merits unless the order for dismissal otherwise specifies."

1. So far as it affected the Locals, Judge Perry's order of August 26, 1958 was a final order when he entered it. It remained a final order when we dismissed the Regional Director's appeal therefrom. The order was expressly based on the reasons recited therein. In substance, Judge Perry held that for the reasons stated the Regional Director *had no right to maintain* the action. Inasmuch as Judge Perry dismissed the case on these grounds, he had no occasion to rule on the merits of the cause of action, and he did not then do so. If we had reversed his order, he would have been required to pass on the merits in due course. But we dismissed the appeal without reversing and this left no case pending before Judge Perry and hence his entries of findings and conclusions thereafter were not germane to any action in his court. Their entry was error.

It is not apparent how *Stewart* v. *Oneal*, 237 Fed. 897, cited by Judge Perry's counsel in his memorandum filed in this court, is applicable here. The same is true of *Wilson* v. *Aderhold*, 89 F. 2d 903, which recognizes that where an appeal from a conviction in the district court has been dismissed by a court of appeals, the district court has authority to *enforce* its judgment. This is elementary but

7. 28 U. S. C. A. rule 41 (b).

has no bearing upon the case at bar because we are not here concerned with any effort by the district court to enforce its judgment. Its judgment was merely the dismissal of a petition filed by the Regional Director.

There is nothing in rules 41 (b), 52 (b) and 60 (b) of the Federal Rules of Civil Procedure,[8] all cited by Judge Perry, which is inconsistent with our holding.

So far as relevant herein, rule 41 (b) provides:

> "(b) **Involuntary Dismissal: Effect Thereof.** For failure of the plaintiff • • • to comply with • • • any order of court, a defendant may move for dismissal of an action • • • against him. • • • *Unless the court in its order for dismissal otherwise specifies*, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits." (Italics supplied for emphasis.)

Counsel for Judge Perry argues in this court, —

> "The judgment of the district court, *although resulting from the Board's refusal to allow its Director to testify*, operated, by virtue of Rule 41 (b) 'as an adjudication on the merits,' *i.e.*, as a dismissal of the action 'with prejudice.' • • •" (Italics supplied for emphasis.)

He overlooks the fact that the order of dismissal specifies the precise grounds upon which the petition was dismissed.[9] He also overlooks the fact that, according to the

8. 28 U. S. C. A., rule 41 (b), 52 (b) and 60 (b).

9. The order of dismissal reads, *inter alia*, as follows:

> "1. Conduct by petitioner of a preliminary investigation of the amended charge as required by Section 10 (1) of the Act and Section 101.4 of the NLRB's Statements of Procedure prior to filing a petition for injunction based thereon is a condition precedent to petitioner's right to file a petition and is a jurisdictional requirement compliance with which respondents are entitled to challenge and litigate in this proceeding. • • •
>
> "2. Petitioner is not by law entitled to withhold evidence as

court's order, the dismissal was based upon a failure of a jurisdictional requirement, which is expressly excepted from the operation of rule 41 (b).

We hold that, under rule 41 (b), Judge Perry, having in the order for dismissal specified the grounds therefor, which, as to the Locals, did not involve the merits of the case, the dismissal order does not operate as an adjudication upon the merits. The purpose of the inclusion of the quoted sentence in rule 41 (b) is to state the effect of a general dismissal in which the court specifies no grounds therefor.

Even if we were to indulge, in Judge Perry's behalf, an assumption that rule 41 (b) is ambiguous, we would be confronted with the proposition that the construction of this rule for which his counsel contends, is in derogation of the common law and that, therefore, the rule is to be construed strictly. At common law a dismissal on a ground other than the merits would not constitute *res judicata* in a later case. *Haldeman* v. *United States*, 91 U. S. 584, 586; *Pueblo de Taos* v. *Archuleta*, 64 F. 2d 807, 812; *Gardner* v. *United States*, 71 F. 2d 63, 64; *Burnett* v. *United States*, 80 F. 2d 151, 154.

Within the framework of the rules of civil procedure, rule 1[10] provides that said rules "shall be construed to

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to its compliance with said jurisdictional requirement in this proceeding in which petitioner is invoking the court's aid and seeking judicial relief. • • •

"3. Petitioner's refusal to testify and produce the evidence required by the subpoena deprives respondents of opportunity to establish a relevant defense, by due process of law.

"4. [This item relates exclusively to the International.]

"5. For the foregoing reasons, an order should be entered dismissing the petition for injunctive relief as to all respondents.

"ORDER.

"It is hereby ordered, adjudged and decreed that the petition be and it hereby is dismissed. • • •"

10. 28 U. S. C. A. rule 1.

secure the *just*, • • • determination of every action". (Italics supplied.) With this admonishment in the rules themselves, we would not be justified in ascribing to Judge Perry's order of dismissal the effect of an adjudication on the merits, when the order clearly specifies his grounds therefor and conspicuously refrains from mentioning the merits of the case. Such a result would obviously be *unjust*. It would make the rule a means of entrapment of the plaintiff.

Rule 52 (b) of the Federal Rules of Civil Procedure[11] fixes the time for amending findings and making additional findings of fact. Because of the grounds upon which we are granting relief to the Regional Director, the contents of rule 52 (b) are not relevant.

The relevant provisions of rule 60 (b)[12] are:

> "**Rule 60. Relief from Judgment or Order**
>
> • • •
>
> "**(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.**
>
> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: • • • (6) any other reason justifying relief from the operation of the judgment. • • •"

As the language of the rule indicates, its purpose is to *relieve* a party from a final judgment, order, or proceeding. As we have pointed out, the final judgment or order in the case before Judge Perry was the order of dismissal of the petition of the Regional Director. The order was entered on the motion of the respondents named in the petition. They procured the entry of the order. They have not sought *relief* from the order of dismissal and no reason is suggested as to why they want *relief*

11. 28 U. S. C. A. rule 52 (b).
12. 28 U. S. C. A. rule 60 (b).

from an order which they caused the district court to enter. It is our opinion that rule 60 (b) has no application to this case.

2. In the situation presented to us, mandamus is the appropriate remedy. Certainly no appeal could have been taken from the entry of the supplemental findings and conclusions of law. They do not constitute an order or judgment.[13] *Breeding Motor Fr. Lines* v. *Reconstruction Finance Corp.*, 172 F. 2d 416, 425, cert. denied 338 U. S. 814. From a practical standpoint, there is a substantial doubt as to whether a new section 10(1) proceeding would succeed if these findings and conclusions are to remain of record and thus might be cited in an effort to defeat such new proceeding. Their continued existence would afford a pretext for citing them in an effort to bolster an argument that the record before Judge Perry is *res judicata* or collateral estoppel in proceedings against the same unions on new causes of action. They should be immediately nullified to remove the potential mischief inherent in them. The alacrity with which respondents cited to Judge Harper the proceedings before Judge Perry is proof that the potentialities here envisaged do not lack substance.

For the reasons above set forth, a writ of mandamus will issue directing and commanding respondent the Honorable J. Sam Perry, Judge of the United States District Court, as aforesaid, to forthwith enter an order of said court setting aside and striking from the record the supplemental findings of fact and conclusions of law which he made in case No. 58 C 1512 on October 7, 1958.

WRIT OF MANDAMUS TO ISSUE.

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13. 28 U. S. C. A. § 1291: "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts . . . ."

APPENDIX E.

IN THE UNITED STATES DISTRICT COURT

Eastern District of Missouri,
Eastern Division.

SALVATORE COSENTINO, Regional Director of the Fourteenth Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD, *Petitioner*, *vs.* LOCAL 28, INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, AFL-CIO; and E. A. ADAMS and HARRY RUTAN, its Agents, *Respondents.*	No. 58 C 485 (2)

ORDER.

This action was brought by the National Labor Relations Board, through its regional director, for a temporary injunction to enjoin defendants from picketing which it is alleged constitutes an unfair labor practice. Respondents have moved for a dismissal of this action on the ground of *res judicata*.

On the complaint of the Texas Company, the N. L. R. B. instituted a similar action against respondents in the United States District Court for the Northern District of Illinois, Eastern Division (hereinafter referred to as the Chicago Case). Respondents sought to defend that action on the ground that the Board had failed to comply with its own Statement of Procedure in that it had not requested a written statement of position from respondents nor had

it interviewed representatives of Local 28. In order to show this noncompliance, a subpoena *duces tecum* was issued to compel the regional director to produce certain of his records. Upon the regional director's failure to produce those records, Judge Perry dismissed the action. An appeal was taken from this dismissal. The Board then sought a dismissal of the appeal after it had discovered that it had not in fact conducted the proper investigation of the charges. The appeal was dismissed with prejudice. On the motion of respondents, Judge Perry made supplemental findings of fact and conclusions of law to the effect that Local 28 is not a labor organization, and that the picketing complained of was primary rather than secondary.

The charges filed with the Board which gave rise to the present action were made by Ingram Barge Company, and concerned incidents of picketing which occurred after those which were the basis of the original action.

In opposition to respondent's motion to dismiss, petitioner contends that Judge Perry's ruling is not *res judicata* in the case at bar because: (1) The parties are not the same; (2) the cause of action is not the same; (3) Judge Perry's judgment was not "on the merits"; and (4) the nature of Judge Perry's judgment is in doubt.

The basis for the contention that the parties are not the same is that the charges in each case were filed with the Board by a different company. The petitioner in each of the actions is the Board acting through its regional director. Even though the charging party may have a right to appear by counsel, the exclusive right to seek injunctive relief in the federal courts against unfair labor practices is in the Board. *Food Basket* v. *Amalgamated Meat Cutters, etc.*, 124 F. Supp. 463.

The acts complained of here are basically the same as those which were the subject of the Chicago Case, and were part of a continuing course of conduct. The relief

sought (injunction) is the same. As admitted by counsel for petitioner on oral argument, if the injunction requested in the Chicago Case had been granted it would have enjoined the conduct complained of here. Petitioner's argument, if carried to its logical conclusion, would allow it to bring separate actions for injunctions for each day's picketing merely by finding a new party to file a charge before the Board. The ruling contended for by petitioner would allow it to bring actions in successive forums until it found one favorable to its point of view. This position is contrary to the established system of procedure in the courts of this country.

The dismissal of the Board's petition by Judge Perry was based on its failure to comply with the subpoena duces tecum issued in that action. Under Rule 41(b) of the Federal Rules of Civil Procedure dismissal of an action for failure to comply with an order of the court operates as an adjudication upon the merits unless the order for dismissal otherwise specifies. The effect of such a dismissal was considered in *Fisher* v. *Dover S. S. Co.*, 121 F. Supp. 528, aff'd 218 F. 2d 682, as follows, l.c. 530:

> "The said judgment of dismissal, though rendered without a trial had the same effect and barred a subsequent action for the same claim."

Petitioner claims that Judge Perry's decision was based upon the failure of the Board to comply with a jurisdictional requirement i.e. failure to conduct the preliminary investigation provided for in the Board's Statement of Procedure. It contends that there is at least a doubt as to the basis for the decision and that therefore, Judge Perry's ruling cannot be *res judicata*. The court does not share petitioner's doubt as to the basis for Judge Perry's decision. He clearly states, in his third conclusion of law, that:

> "Petitioner's refusal to testify and produce the evidence required by the subpoena deprives respond-

ents of opportunity to establish a relevant defense, by due process of law."

Respondents' motion to dismiss is sustained, and cause dismissed.

S Roy W. Harper,
U. S. District Judge.

January 8, 1959.

APPENDIX F.

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*) are as follows:

Section 10.

* * * * * *

"(1) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 8(b) of this Act, the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: * * *"

The pertinent provisions of the Federal Rules of Civil Procedure are:

"Rule 6. Time

* * * * * *

"(c) Unaffected by Expiration of Term. The period of time provided for the doing of any act

or the taking of any proceeding is not affected or limited by the continued existence or expiration of a term of court. The continued existence or expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action which has been pending before it. As amended Dec. 27, 1946, effective March 19, 1948.

* * * * *

"Rule 41. Dismissal of Actions

* * * * *

"(b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. In an action tried by the court without a jury, the court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits. As amended Dec. 27, 1946, effective March 19, 1948.

* * * * *

"Rule 52. Findings by the Court

* * * * *

"(b) Amendment. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the ques-

tion of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.

• • • • •

"Rule 54(c). Demand for Judgment

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"Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is entered is entitled, even if the party has not demanded such relief in his pleadings."

• • • • •

"Rule 60. Relief from Judgment or Order

• • • • •

"(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent

action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U. S. C., 1655, or to set aside a judgment for fraud upon the court. Writs of *coram nobis, coram vobis, audita querela*, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action. As amended Dec. 27, 1946, and Dec. 29, 1948, effective Oct. 20, 1949."